A HYBRID-APPROACH TO PROTECT RIGHTS? AN ARGUMENT IN FAVOUR OF SUPPLEMENTING CANADIAN JUDICIAL REVIEW WITH AUSTRALIA'S MODEL OF PARLIAMENTARY SCRUTINY

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INTRODUCTION

One of the difficult issues liberal democracies face is how to distinguish allowable government action from the protected sphere of human activity. Rights have become increasingly important as a critical standard for evaluating the justification of policy. Yet no consensus exists on the best institutional methods for defining the scope of rights or for ensuring that rights are adequately and appropriately considered in the formulation of policy. Since the Second World War, many countries have shown an increasing interest in utilising a bill of rights against which to evaluate state action. Even parliamentary systems, founded on Dicey's precepts that the rule of law and parliamentary sovereignty are a superior way for respecting rights,[1] have departed from, or have been pressured to alter, this institutional framework.

However, a bill of rights, which accords a more authoritative role for judges in resolving citizen-state conflicts, is not without its critics. Proposals for bills of rights attract a wide range of concerns that judicial review of codified rights will reify rights, distort the way political issues are dealt with, assign priority to a different range of values, and result in elected officials reneging on their political responsibility to undertake controversial political decisions. Many argue that often the rights claims being presented in court are not distinct from policy interests: they are simply "politics

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1 A V Dicey, *Introduction to the Law of the Constitution* (1967).

dressed in different garb".[2] As such, they are exploited and manipulated to serve particular political interests. For example, some on the political right view rights claims by feminists and special interest groups as an undemocratic way of garnering appeal for policy agendas that have failed in the traditional realm of representative politics; whereas many on the political left condemn the use of rights litigation by powerful groups to insulate corporate or other entrenched interests from affirmative state action intended to improve conditions for the disadvantaged. Yet supporters look optimistically at rights as moral claims against the state which should be accorded priority over all conflicting societal and community objectives. Their preference for a judicially interpreted bill of rights reflects the belief that courts are better situated to protect rights because judges, detached from the pressures of electoral and party politics, will base their decisions on principles rather than on discretionary policy or partisan considerations.

Political scrutiny as an alternative to judicial review

An alternative approach to a bill of rights, which tends to attract less attention, is Australia's use of parliamentary committees to scrutinise bills for rights conflicts. Three Australian jurisdictions have established parliamentary committees to evaluate government bills and identify rights violations. The hope of civil libertarians is that by evaluating proposed legislation in a systematic manner and reporting to parliament about possible rights concerns, a scrutiny of bills committee will facilitate debate about the justification of policies which, in turn, will put pressure on government to explain, justify and, where warranted, amend its bills. The first of these committees is the Senate Standing Committee for the Scrutiny of Bills (the Commonwealth Committee) established in 1981. In 1992 Victoria established a Scrutiny of Acts and Regulations Committee (the Victorian Committee) and in 1995 Queensland created the Scrutiny of Legislation Committee (the Queensland Committee). The Commonwealth and Victorian Committees have similar terms of reference. Neither has codified statements of rights but refer to rights generically. The Commonwealth Committee is to consider whether bills or acts trespass unduly on personal rights and liberties whereas the similar criterion for the Victorian Committee is whether a provision trespasses unduly on rights or freedoms. Other criteria for reviewing legislation, from a rights perspective, are similar and include whether a bill or act makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers, or makes such rights or liberties dependent upon non-reviewable administrative decisions.[3] The Queensland Committee's terms of reference are more specific and more

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2 A C Hutchinson and P J Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 *Stanford Law Review* 199 at 206.

3 The Commonwealth Committee's terms of reference here does not include the word "administrative" but instead refers only to "non-reviewable decisions". In addition, the terms of reference for both Committees include inappropriately delegating legislative power and insufficiently subjecting the exercise of legislative power to parliamentary scrutiny. The Victorian Committee has additional responsibilities relating to its own constitution, and to the jurisdiction of the Supreme Court. It also is charged with scrutinising subordinate legislation or to review any Act referred to the Committee. A separate Commonwealth committee, established in 1931, scrutinises subordinate legislation.

closely resemble a statement of codified rights. They include whether bills and subordinate legislation are consistent with fundamental legislative principles[4], which require that legislation:

(a) makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with the principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise manner.

This paper will argue that, although Canada has chosen judicial review of entrenched rights, it should consider supplementing this with the Australian model of parliamentary scrutiny. The paper consists of three parts. Part One will argue that the task of scrutinising legislation for rights violations is neither a uniquely legal one nor one for which judicial review is inherently superior. Furthermore, parliamentary scrutiny of bills can enhance the quality of democracy by revitalising parliament to engage in difficult and contentious decisions about what priority should be attached to conflicting values. Part Two will discuss the constraints faced by scrutiny committees and will suggest that a hybrid model of judicial review and parliamentary scrutiny would offer Canada a more effective and robust model for protecting rights than currently exists. Part Three will undertake a case study of the Commonwealth Committee to examine its role and influence in evaluating a controversial policy issue, namely restrictions on the legal rights of refugee claimants. This study will allow for a preliminary assessment of how a scrutiny committee can help facilitate a principled parliamentary debate about the justification, in rights terms, of proposed legislation. This is a useful case study because a telling indicator of the effectiveness of rights-

4 Fundamental legislative principles are described as "the principles relating to legislation that underlie a parliamentary democracy based on the rule of law". The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament. Legislative Standards Act 1992 (Qld), s 4(1).

protecting mechanisms is the extent to which rights provide an effective critical standard for evaluating the justification of policy objectives that claim to represent a general state interest yet appear to restrict rights of vulnerable members of society, such as refugee applicants.

1 IS JUDICIAL REVIEW A SUPERIOR METHOD FOR PROTECTING RIGHTS?

Arguments for and against a bill of rights

Many reasons can be offered for considering a bill of rights. A statement of a society's fundamental and enduring values can encourage greater sensitivity to possible unintended legislative effects which may be prejudicial or discriminating. Codified rights can empower vulnerable or under-represented groups by encouraging them to mobilise around an agenda of inclusion, expressed in substantive rights-based terms. A bill of rights can also provide an effective check on discretionary powers wielded by the police or others acting on behalf of the state.

However, those who champion a bill of rights tend to do so more for its check on the policy decisions of representative institutions. Rights, many believe, will be better protected if judges can scrutinise and correct the decisions of elected representatives. Thus, a bill of rights, particularly a constitutionally entrenched one, will result in better protection for individual rights because it will insulate rights from government action: majority preferences, discriminating customs and parochial values will be replaced as policy calculi by principled and reasoned decision making, detached and insulated from political influences. As a result, it is argued, a polity can only benefit from ensuring that rights are paramount to immediate policy needs, often dismissed as serving utilitarian and politically expedient considerations that are insensitive to rights, particularly those of vulnerable or under-represented members of society.

Although there is considerable moral persuasion to the argument that fundamental rights should not be easily, if ever, compromised because it is politically expedient or cost-effective to do so, it is necessary to wave a cautionary flag in the face of expectations that a bill of rights will ensure that rights are duly respected in the course of policy-making. Although I am not arguing against a bill of rights, it is important to recognise that supporters may be clinging to questionable assumptions about the purported benefits of entrenched rights. These include the view that judicial review will reflect more enlightened and progressive responses to complex policy disputes, that judges are better situated (politically and intellectually) to engage in principled decision-making, and that the nature of the questions asked of them is conceptually different from the kinds of discretionary choices that inform decisions emanating from the political branch of government.

Nowhere are assumptions about the superiority of the judicial, as opposed to political, mode of review more clearly expressed than in the work of American scholar Ronald Dworkin. Rights, Dworkin argues, are best understood as trumps over political decisions that promote other societal or community objectives.[5] A rights-respecting

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5 R Dworkin, *Taking Rights Seriously* (1977) at 269. See also R Dworkin, "Liberalism" in S Hampshire (ed), *Public and Private Morality* (1978) at 136.

society must distinguish between the strategies a government uses to secure the general interest, as a matter of policy, and individual rights which, as a matter of principle, should have primacy over these collective strategies.[6] Judges play an integral role in ensuring that principles are not sacrificed for utilitarian reasons because of their unique capacity to engage in legal reasoning. What is required of judicial review is no less than "a fusion of constitutional law and moral theory".[7] Dworkin exudes great confidence in judges' abilities to invoke entirely legal and principled decisions which, even in hard cases, are not based on their personal preferences but reflect their best judgment of what the law requires. And even when they are wrong, it is preferable for society to have asked judges to "reason intuitively or introspectively" about different conceptions of equality or other contested concepts than to subject decisions of individual rights to legislative responsibility. To presume otherwise would be to suppose that the ordinary voter has better capacity to engage in moral argument than judges.[8]

This claim that it is better for citizens to live with the occasional errant judicial decision, because they should be confident in, and deferential towards, the expertise of judges, reflects a shallow view of democracy. It is a view which does not recognise the right and responsibility of the citizen, via his or her elected representatives, to debate and participate in difficult decisions about the scope of political responsibilities and how to reconcile conflicting values.

For a polity to defer to judges on difficult rights conflicts is also to treat rights as if they are exclusively legal concepts that provide clear and authoritative answers to philosophically-contested dilemmas. Rights may be important normative considerations in policy development. However, they offer incomplete guidelines on the basic values that need to be respected in the course of state action. Some rights claims embody values common to contemporary liberal democracies, for example, political freedom, religious toleration, due process of law and equality. Yet when we move away from abstract rights claims to specific political conflicts, we confront dilemmas in determining how to assess policies and evaluate priorities.[9]

It seems trite to have to state that rights are not absolute and must be limited. It is this element in protecting rights that is the most difficult, and arguably most significant, task of a responsible polity. Not only will protected rights conflict with each other, they will certainly come into conflict with public policies that are not necessarily inspired by malevolent intentions but which may seek to address the needs of vulnerable groups or the well-being of society. No matter how brilliant or expansive the visions that go into drafting bills of rights or how united the drafters are in their intents, it is impossible to anticipate all the circumstances that should be protected, in all contexts, and for all time. Reasonable people will have substantive disagreements about the scope of protected rights, the justification that should be required before restricting rights, or the way of measuring or evaluating whether that justification has been met.

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6 R Dworkin, *Law's Empire* (1986) at 381.
7 R Dworkin, *Taking Rights Seriously* (1977) at 149.
8 R Dworkin, *A Matter of Principle* (1985) at 11-13.
9 P H Russell, "Political Purposes of the Canadian Charter," (1983) 61 *Canadian Bar Review* 30 at 44-45.

Representative institutions should be sensitive to rights considerations. However, a serious concern arises if an uncritical and non-contextual focus on rights in policy debates give political leaders, weary of controversy, a convenient refuge from undertaking difficult moral and political decisions. In light of the tendency in bills of rights to posit rights in abstract terms, while offering little in the way of guidance for determining the actual scope of the right or circumstances which should be protected, a bill of rights should not be seen as negating the responsibility of governments to give order to, and reconcile the diverse values and interests of, society. It is one thing for governments to take heed of criticisms when pursuing policies that may unduly or unjustifiably restrict a protected right. It is quite another, however, for governments to renege on the political responsibility to make difficult decisions in the public interest simply because these decisions attract rights-based objections. This is particularly true where the rights dispute is based not on a core fundamental value but on a more peripheral claim (the differences, for example, between the importance of free speech in the context of expressing opinion on political issues as opposed to communication for the purpose of prostitution). Given the uncertainties in bills of rights as to whether legislation is impugned by the vaguely worded rights and, more significantly, whether legislation represents legitimate goals that impose reasonable and justifiable limits on protected rights, it is important that entrenched rights not undermine the political will and resolve to promote contentious values that promote a compelling societal objective.

A second problem with Dworkin's claim that rights should trump all policy choices is that it is based on the view that judges are engaged in a task that is conceptually distinct from the discretionary policy decisions of representative institutions. However, this claim is not confirmed by empirical analysis of rights-based jurisprudence. This is amply demonstrated in the Canadian context.

Judicial scrutiny of Canadian legislation

In 1982, Canada amended her Constitution to include a judicially interpreted bill of rights — the Canadian Charter of Rights and Freedoms. The constitutional amendments included an explicit recognition in s 52 of the Constitution Act 1982, that the Constitution, which includes the Charter, is the supreme law of land and that any law that is inconsistent with its provisions is of no force or effect. Section 24(1) of the Charter provides that anyone whose rights have been infringed may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Supreme Court of Canada has decided to assess legislative conflicts under the Charter in two stages: (1) is a right infringed and, if so, (2) is the restriction a reasonable one? The Court has encountered considerable difficulty in addressing this second component.[10]

The Charter states explicitly in section 1 that rights can be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, this does little to help the Court. The reference to the values of "a free and democratic society" is sufficiently contested that it invites

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10 Space does not permit a full discussion of the Supreme Court's jurisprudence on how to assess whether infringements on rights are reasonable. For a fuller discussion see J L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (1996).

philosophical debates about what kinds of policies are important enough to justify limiting rights. Should rights be limited only to protect other enumerated rights? Is it acceptable to limit rights to promote community or collective values? Are concerns about the polity's general welfare sufficient justification? Or should apprehension of harm be replaced by empirical evidence of actual harm?

When assessing the importance of legislation, the Court has been extremely reluctant to disagree, outright, with governmental claims that the policies they promote are important enough to justify limiting rights. Because it is assumed that governments generally enact policies for good reasons, it is not surprising that the Court rarely disagrees with claims that impugned policies are justified. A more cynical view is that in light of the fact that judicial review is prone to criticisms that it is inconsistent with democratic principles, the Court does not go out of its way to invite accusations that it is frustrating the will of democratically elected representatives when it can do indirectly, what it is unwilling to do directly: it can rule that legislation is unjustified without actually criticising the policy objective by deciding that the legislation has not been carefully designed or drafted enough.

Regardless of what motivates its approach, the fact is that the Court rarely presents governments with a ruling that under no circumstances can the legislative objective be enacted. What this has meant is that the Court's principal focus has been on the second part of this inquiry: has legislation been designed carefully enough having regard to the reasonableness requirement? Does it meet judicially-imposed criteria of proportionality,[11] the most important element of which is whether legislation restricts rights as little as possible.

But here the Court is on even more difficult terrain because reasonableness assessments of the design of a bill are not something for which judges have any particular expertise. This is a task akin to policy analysis — one which presumes an evaluation of the merits of legislation in terms of how the policy was conceptualised and drafted. Policy-making, by its very nature, is a process where those responsible often must address multiple objectives, make distinctions about who will benefit or be affected, and anticipate circumstances that may undermine or influence the realisation of objectives. It is necessarily subject to discretionary judgments based on a combination of relevant expertise, comparative experience and informed best estimates.

The lack of precision to policy-making sits incongruously with the seemingly objective standard applied by the court: does the legislation impair rights as little as possible? The objective quality of this standard arises from the implication that, to restrict rights as little as possible, there must be a preferred and apparent policy alternative — indeed a correct one: preferred because it imposes a less severe restriction on rights; apparent because it is supposedly readily identifiable; and correct because it is the optimum policy option, the one with the least restrictive implications for protected rights. The trouble with this approach is that policy-making is not some precise science amenable to correct/incorrect, good/bad evaluations that would allow policy-makers, or those scrutinising their decisions, to home in on the perfect solution to complex social problems (from a rights perspective as well as from a practical one).

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11 The Court's general approach to assessing the reasonableness of legislation was provided for in *R v Oakes* [1986] 1 SCR 103.

Over time, the Court has shown a greater appreciation for the complexity of policy development when determining whether legislation has been designed carefully enough, especially where the evaluation of conflicting social science data is required.[12] While in its earlier jurisprudence the Court stated that rights can be limited only where legislation constitutes the least intrusive infringement on a right, its test has softened considerably to a requirement that a policy be "reasonable" under the circumstances.[13] In choosing from a range of means, Parliament need not select the perfect or best possible legislative scheme,[14] but rather one which is appropriately tailored in the context of the infringed right.[15]

Nevertheless, despite its evolving approach to assessing the reasonableness of legislative means, judges are systematically scrutinising legislation, not in the context of whether the legislative objective itself is justified in rights-based terms, but on the basis of assessing the quality of how the policy initiative was translated into legislation.

The Court's review of legislation leads me to make the following observation. Since the Court has not defined its task so much in terms of deciding whether policy objectives themselves are acceptable, in rights-based terms, but instead whether the ways and means of a policy are designed carefully enough, the judicial task cannot be distinguished, conceptually, from the kind of subjective and discretionary considerations that originally shaped the policy decision. In viewing judicial review in this manner, one cannot avoid asking the following questions:

- Do judges bring any particular expertise to this task?
- If a constitutional text is of limited guidance to this aspect of judicial review, how should the court assess the justification of impugned legislation?
- If the exercise rests on anything less than applying apparent and accepted constitutional values or standards, is there any justification for discretionary judicial opinions to be given primacy over discretionary political ones?
- Would it be preferable for courts to rely more heavily on the views of governments or parliament?

The Supreme Court's difficulty with evaluating the reasonableness of legislation should stand as a caution for those who assume that all that is necessary to vindicate rights claims is to codify rights and give judges an authoritative role to strike down offending legislation. Advocates of a bill of rights might respond that what is happening under the Charter is unique to Canada and is not indicative generally of judicial review. To this suggestion I respond that the structure of the Charter makes visible, but does not cause, the difficulties associated with judicial review. The problem is not that the Court has selected the wrong guidelines or has made mistakes in

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12 *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927 at 989-990 per Dickson CJ for the majority.

13 Lamer CJ stated, on the issue of whether Parliament should be required to choose the perfect or best possible legislative scheme, that the Charter "does not require Parliament to 'roll the dice' in its effort to achieve 'pressing and substantial' objectives in order to adopt the absolutely *least* intrusive provision." *R v Chaulk* [1990] 3 SCR 1303 at 1343 (emphasis in original).

14 Ibid at 1343.

15 Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man) [1990] 1 SCR 1123 at 1138 per Dickson CJ for the majority.

applying these. The difficulty is inherent in the task of judicial review. The complexity of policy development ensures that courts are often poorly situated to evaluate two questions fundamental to how the Court has approached judicial review of the Charter:

(1) does the legislative objective justify restricting the particular right in question?

(2) was the magnitude of the rights restriction appropriate or were better and less restrictive means available?

Even where bills of rights do not contain explicit limitation clauses, such as in the United States, courts still must devise implicit limitations on rights that take into account a range of legislative and administrative considerations. Free speech cases provide a good example of the discretionary nature of judicial decisions about how to evaluate the importance and means of legislative decisions. Courts have distinguished between different forms of speech and have concluded that certain limited categories of speech are considered to have lower value, such as commercial advertising and sexually explicit speech. Thus the regulation of these is subject to less stringent standards of review which makes it easier for government to justify restrictions on some forms of speech as compared with others.[16]

Political scrutiny in Canada

Notwithstanding the difficulties the Court faces in evaluating the reasonableness of impugned legislation, it does not necessarily follow that Parliament, as it currently operates, is a better institutional choice for rights-based scrutiny.

Little is known about how bills are scrutinised in Canada for rights violations. Canada has a Standing Joint Committee for the Scrutiny of Regulations but not a committee to scrutinise bills. The Minister of Justice has a statutory obligation to examine all regulations and government bills for their consistency with the Charter and to report any inconsistencies to the House of Commons.[17] To comply with this the Department of Justice has created new procedures for Charter review. This has entailed the establishment within the Department of Justice of a human rights section which has become a centre for Charter expertise for Justice lawyers and line ministries. Within each department, there are also Justice lawyers responsible for providing legal advice on potential Charter problems.[18]

Research is lacking on what role justice lawyers play, when they become involved, the nature of their advice, or its influence on policy decisions. In light of concerns about the weaknesses of a system of executive-based scrutiny,[19] the question arises: to what extent does the scrutiny process, and gathering of information and materials to justify a

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16 For a thorough discussion of American jurisprudence involving free speech cases see K Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995). See also C E Baker, *Human Liberty and Freedom of Speech* (1989).

17 *Department of Justice Act*, RSC 1985, c J-2, s 4 and the Statutory Instruments Act, RS 1985, c S-22, s 3 as amended by the *Statute Law* (Canadian Charter of Rights and Freedoms) *Amendment Act*, RS 1985 (1st Supp), c 31, ss 93-94.

18 P J Monahan and M Finkelstein, "The Charter of Rights and Public Policy in Canada" in P J Monahan and M Finkelstein (eds), *The Impact of the Charter on the Public Policy Process* (1993) at 10.

19 For a discussion of the problems with executive-based scrutiny see D Kinley, *The European Convention on Human Rights: Compliance without Incorporation* (1993).

policy decision, resemble window-dressing, that is, to support a decision that has already been made, as opposed to having been collected to justify or rebut the importance of the legislative initiative or choice of legislative means?

Although the Minister of Justice is statutorily obliged to report to Parliament when proposed legislation does not to comply with the Charter, this has not occurred to date. Two explanations are possible. One is that the federal government's process of internal scrutiny[20] has been so effective that ministers respond to Charter concerns and revise bills accordingly (at least to the extent that the Minister of Justice feels there is a reasonable chance that the legislation will pass the Court's scrutiny). The other explanation is more sceptical. A system of executive-based internal scrutiny, within a parliamentary system, is inherently weak: the Canadian model lacks the degree of independence that is a beneficial feature of those systems of scrutiny which operate beyond the direct control of the executive.[21]

The requirement that the Justice Minister report to Parliament where proposed legislation does not comply with the Charter is similar to a provision in the 1960 Canadian Bill of Rights that the Minister of Justice submit all draft bills and regulations to the clerk of the Privy Council to ascertain whether they contain provisions inconsistent with the Bill of Rights and report any inconsistencies to the House of Commons. Peter Russell, writing in 1969, believed this concept was a step in the right direction to facilitate more robust parliamentary debate. However, a shortcoming, in Russell's view, was that the process "entrusts the Government itself with the responsibility of testing its own proposals against a Bill of Rights" and lacks the teeth to ensure that legislation is duly scrutinised.[22]

Whatever scrutiny takes place within the executive, this is not accessible to parliament which lacks information that would explain the rationale for legislative choices that conflict with protected rights, either in terms of why objectives warrant curtailing a right, or that they have been designed in a way that is as sensitive to the adversely affected right as practically possible. A reading of Hansard does not indicate that parliamentary debate has generally compelled governments to explain or justify their choices where rights are implicated. In fact, little in the public record suggests that parliamentarians are mindful of rights concerns. And even if they were, the combination of an ineffective upper house, strict party discipline and a single-member plurality electoral system that over-represents the winning party have resulted in executive dominance in which parliamentarians have had little influence on policy choices. The relative failure of representative institutions to require that governments justify their policy choices in terms of the Charter shields from public and judicial purview evidence of what assumptions have influenced these policies, how rigorously

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20 Patrick Monahan and Marie Finkelstein suggest that the common interest of Canadian governments to consider rights issues early in the policy process has increased the role and status of attorneys general and their legal advisors to the point that, in many governments, they now constitute a new central agency. P J Monahan and M Finkelstein, above n 18 at 9-35.

21 D Kinley, above n 19 at 103.

22 P H Russell, "A Democratic Approach to Civil Liberties" (1969) 19 *U Toronto Law Journal* (1969) 109 at 125-126.

they have been scrutinised, and whether less restrictive measures have been contemplated.

This lack of rights debate within Canadian representative institutions is unfortunate. As I argue elsewhere, the Supreme Court's difficulty in evaluating the reasonableness of policy has encouraged judges to relax considerably the threshold for establishing that legislation has been designed carefully enough, particularly in the realm of social policy. This diminution in the difficulty for satisfying reasonableness criteria, when combined with the Court's reluctance to disallow specific policy objectives, has meant that governments have been able to exert considerable influence in determining the scope of justifiable limits on protected rights. Governments have, in other words, helped define the very constraints that the Charter was intended to impose on them.[23] With few exceptions,[24] judicial review of the Charter has not generally resulted in priority being given to a significantly different range of values from those espoused by federal or provincial governments as reflected in legislation.

2 PARLIAMENTARY SCRUTINY

The lack of rights debate within parliaments raises the troubling question of whether rights considerations are being given appropriate attention in either the executive, legislative or judicial arenas. To address this, Canadian provincial and federal legislatures should think seriously of following Australia's lead of establishing standing parliamentary committees to scrutinise all bills in terms of their consistency with rights. If parliament became a place for discussing the justification for policies and their effects on protected rights, this important public record would, through media coverage and observations by interested individuals and groups, stimulate a broader public debate on the merits of policies that raise rights issues. This would put pressure on governments to explain, justify and, where warranted, revise policy decisions.

Having argued that there is a role for parliament to play in putting pressure on government to justify policy choices where fundamental rights issues are involved, one must confront the reality of how parliament operates. Parliament is not generally a forum where independent members engage in robust philosophical debates in a principled, non-partisan, manner. Rather, it is a weak institution where the structure of power ensures that members assume a subordinate role, disciplined along party lines, in which issues are dealt with in an adversarial format that assumes that the resolution to multi-faceted conflicts can be reduced to two viewpoints — in favour or opposed.[25]

However, this incongruence between how parliament operates, and my suggestion for a greater parliamentary role to identify rights concerns and put pressure on governments to explain, justify and possibly amend policies, does not mean that parliament is incapable of exerting greater pressure on government to justify legislation in terms of its effects on rights. British experience shows that party

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23 J L Hiebert, above n 10 at 152.

24 A particularly notable exception was the narrow majority decision in *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 which struck down regulations on tobacco advertising for violating freedom of expression in a manner that was not a reasonable limit under s 1 of the Charter.

25 C E S Franks, *The Parliament of Canada* (1989) at 14-15 and 31.

discipline need not be as onerous as in Canada, and that parliamentary committees can have some manner of autonomy, without undermining seriously the principles of responsible parliamentary government.[26] The Canadian Parliament has, on occasion, shown itself capable of engaging in principled debate about government's obligations under the Charter in the context of refugee determination policy and in the case of revised rape shield legislation, which addresses what evidence can be admitted in sexual assault trials, introduced in the wake of a negative judicial decision.[27] Finally, parliamentary committees in Australia, which face many of the constraints that have rendered Canadian parliamentary committees ineffective, provide useful models for parliament to scrutinise the implications for rights of governmental initiatives.

Changing governing culture

The hope of supporters of parliamentary scrutiny is that by evaluating proposed legislation in a systematic manner and reporting to parliament about possible rights concerns, these committees will facilitate debate about the justification of policies which, in turn, will put greater pressure on government to explain, justify and, where warranted, amend bills.

However, it is necessary to address several constraints that parliamentary scrutiny committees face. The emphasis in parliamentary systems on efficient executive government leads to a political culture in which governments are resistant to perceived obstacles to the fulfilment of their mandates and policy programs. Furthermore, the tendency of parliamentary systems of government to produce disciplined and strict parties exacerbates the intrinsic rivalries between parties. In this highly partisan political culture, a government party is not willing to give the appearance that it is easily, or frequently, influenced by criticisms from partisan rivals on matters of policy. To acknowledge that a bill may impose an undue restriction on a right is to accept the implicit criticism that the policy is not important enough to justify its restrictive measures. Second, the presence of strict party discipline, with its explicit and implicit sanctions, constrains the ability of party members to openly or publicly disagree with their party leader. Indeed the political culture that is fostered is a highly adversarial one in which, as already mentioned, issues are dealt with in a manner that assumes that the resolution to multi-faceted conflicts can be reduced to two viewpoints — in favour or opposed.

In a sense, committees are struggling to influence the very governing culture in which they exist, that is, the attitudes and beliefs of those whose job it is to introduce, evaluate, criticise and/or defend policy decisions. They are trying to facilitate a principled parliamentary debate about the justification of a bill — does the policy's effect on rights represent an "undue" infringement? However, governments are inclined to view these committees as representing a threat to their ability to deliver their program. And opposition parties are just as likely to view the concerns of scrutiny committees as providing a convenient and effective means for embarrassing the

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26 Ibid at 31.

27 For a discussion of the role rights played in structuring particular political debates see the following articles by the author, "Debating Policy: The Effects of Rights Talk" in F L Seidle, *Equity & Community: The Charter, Interest Advocacy and Representation* (1993); and "Political Approaches to Reasonable Limits" in P J Monahan and M Finkelstein, above n 18.

government. Neither reaction is conducive to a principled debate about the justification of a bill.

What may be required for a scrutiny of bills committee to facilitate principled rights-based debate is no less than a transformation of the governing culture to a more rights conscious one in which a willingness to make amendments to address unintended or unnecessary rights violations is not regarded as a political failure for the government. Although substantive disagreements will occur on the worthiness of policies and the seriousness of rights violations, there should be no shame or political loss of face to amend bills to redress unintended and unnecessary transgressions on rights.

One advantage that Australia has over Canada, in terms of the potential role and influence of bills committees, is that unlike Canada two of the three jurisdictions with scrutiny of bills committees have an elected upper house which contributes to a more effective system of checks and balances on governmental authority. However, what should restore the balance, from a Canadian perspective, and perhaps even give Canada an edge, is the existence of the Charter. The possibility of judicial nullification, which may be increased where serious rights concerns have been identified by a bills committee but have been not addressed by the executive, should augment substantially the influence that a Canadian committee may have on parliamentary debate.

Although differences of opinion exist as to whether judicial review, and the systematic focus on the rights dimensions of social and constitutional policy, are a benefit or liability to Canada, the Charter has resulted in an undeniable increase in the frequency of "rights talk" in judicial, public policy and constitutional debates. This increased focus on rights has manifested itself in pressures to reassess existing ideas about what particular rights mean, and the nature of state obligations, whether in the context of equality claims or the procedural protections offered to those suspected of breaking the law. Together, the symbolic aspects of the Charter (for example, its claim to "guarantee" rights), the new ability of citizens to challenge legislation in rights-based terms and obtain remedial redress, and the distinct possibility that legislation can be nullified if it is found by the courts to be inconsistent with the Charter's fundamental values, have increased the political costs for governments being, and appearing to be, insensitive to rights considerations. Notwithstanding party cohesion and discipline, the presence of the Charter would likely make it more difficult, than it would otherwise be for Canadian government parties to admonish and punish committee members who, in performing their statutory duty, are not only trying to protect rights, but to uphold fundamental constitutional principles.

Divided loyalties

Another serious challenge committee members face is to reconcile the conflict between their statutory obligations and their loyalty to party. Strict party discipline makes it difficult for members to vote in a manner that is inconsistent with their party's position. Thus, the task of having to wear two hats, one as a member of a legislative scrutiny committee and the other as a member of a party, is particularly difficult for government members. As members of the governing party, they may have a strong sense of the policy history of a proposed bill and are sensitive to the government's intents and objectives. In one context they are part of the process that supports a policy and yet in another context they are part of a multi-partisan committee that scrutinises

that very policy for possible rights violations and collaborate in writing a report which may generate criticisms and opposition to the proposed legislation.

The most important element in managing this inherent conflict is that committee members distinguish the task of identifying possible rights violations from undertaking qualitative or partisan judgements about the merits of the policy. Members from all three Australian committees insist that in the process of evaluating bills for rights violations, they do not, and will not, pass judgment on whether the policy is warranted. Not only is this distinction between identifying rights violations and assessing the merits of policy a fundamental characteristic of how the committees operate, but committee members suggest that the system would break down if the committee ever crossed this conceptual line. Committee members and legal advisers suggest that if the committee proffered political assessments of whether policies are justified, the committees would cease to be effective. Not only would they simply mirror partisan divisions within parliament, they would frequently produce minority or dissenting reports, which would diminish their capacity to put pressure on the government to justify or revise problematic clauses. This ability to pressure governments, whether through correspondence with ministers or through parliamentary debate, would be reduced in the face of conflicting opinions because these multiple and competing perspectives would give the impression that the dispute is not so much about principles but about differences in policy preferences. Thus, the existence of differing opinions would provide a ready excuse for the government to maintain its original position and refuse to address areas of concern.

The pressure to avoid partisan divisions has encouraged committees to conceptualise their inquiries as involving two separate issues: does a policy restrict a right and, if so, is the infringement undue? Further, there is a tendency to concentrate on the first issue and, where controversial, leave the resolution of the second issue for parliament. This conceptual approach has not only allowed the committees to avoid partisan divisions, but has enabled them to take a consensual approach to their task. This reporting style is comfortable with many members' view that the question of whether a policy imposes an undue restriction on a right is often a policy issue. Because rights issues are often viewed by committee members as being inextricably intertwined with policy considerations, many believe that their resolution should come from the collective judgment of parliament. What a legislative committee can contribute, in this regard, it to solicit and gather information on the issue, raise the spectre that a right may have been unduly infringed, present this to parliament and, therefore, facilitate debate about whether the policy is justified or appropriate.

Once members move from their role on the committee to resume their parliamentary role, whether as government supporters or opposition critics, they engage freely in partisan debate. Members do not, and will not, cross a party-line, even when the party position is insensitive to the Committee's concerns. This seems, at first glance, to be a contradiction of members' commitment to protect rights. Members insist this is not the case. They argue that they can, and must, be loyal to their party position — that the survival of a parliamentary system of government requires cohesive parties and that members have an obligation to support their party. Indeed, analysis of Hansard verifies the fact that committee members wear their party hats in parliamentary debate and that government members do not vote against their party in parliament, even when the scrutiny committee has raised rights issues which have not been addressed, thoroughly or satisfactorily, by the relevant minister.

Another part of the explanation is that if government members cross the floor and vote against the government, this action may attract attention for a particular issue but, in the end, will be a less effective way of compelling governments to take rights issues seriously in policy development. Both Labor and Liberal members agree that their futures with their parties would be hurt, perhaps irreparably, if they voted against the party in parliament. Not only would their reputations be endangered, so too would the credibility and standing of the committee. Legislative scrutiny committees are in a vulnerable position. If these committees are seen as particularly obstructive, their ability to influence policy decisions and, perhaps, their continued existence may be jeopardised.

Timing

Another challenge these committees face is timing. Their workload is heavy and the requirement of having to review every bill places intense pressure on committee members and their legal advisers. The practice of issuing an Alert Digest, first adopted by the Commonwealth Committee and now used by the state committees, was considered an important and necessary step in establishing the new committee's credentials and making its process transparent.[28] However, the issuing of an Alert Digest poses one of the greatest constraints the committees face. If the Digest is going to be effective, it must identify rights concerns early in the policy process. The weeks when parliament is sitting can be very hectic ones. For example, the Commonwealth Senate Committee considers copies of all bills introduced in either House of Parliament. On the Friday afternoon of every parliamentary sitting week the committee secretariat sends copies of all the bills introduced that week to the legal adviser for examination. The legal adviser examines the bills in the context of the committee's terms of reference and provides a written report the following Monday morning. The report is considered by the Committee, which meets the Wednesday morning of each sitting week, and issues an Alert Digest which is tabled that Wednesday afternoon. This document sets out comments in respect of each bill and refers to the Committee's terms of reference where rights-based and other concerns are raised.

Influences of bills committees on policy

To date little empirical research has been conducted to assess what effects these committees are having on policy; in particular, whether the protection of rights and freedoms has been improved by the systematic scrutiny of bills.

One of the difficulties with assessing a scrutiny of bills committee's effects on policy is that the influences it may exert are both direct and indirect. Although the hope of these committees was that they would provide a critical eye for viewing policies and identifying intended and unintended rights violations, their influence may be broader. For example, the very presence of these committees, and awareness that they are likely to identify rights violations or catch sloppy drafting practices, may itself have a cautionary effect on ministers, their advisers and policy drafters. Thus, the evaluation

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28 Dennis Pearce, former legal counsel for the Senate Standing Committee for the Scrutiny of Bills, transcript of proceedings of "Ten Years of Scrutiny", a seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills, Canberra, 25 November 1991, 7.

of the committee's role and influence cannot be measured by simply comparing the content of bills when first introduced, as opposed to when they receive assent.

Australian scrutiny committee members are confident that the systematic review of bills has improved the quality of legislative drafting by encouraging a culture, both within parliamentary drafting circles as well as ministries, that is far more sensitive to rights concerns. In particular, they point to the influence of their committee in discouraging the use of clauses having retrospective operation, particularly where the legislation would restrict or impair rights. Members say they have also been effective in reducing the breadth and scope of discretionary powers given to those who administer or enforce legislative or regulatory actions, for example with respect to search and seizure powers. They have also been influential in reducing the situations in which legislation effectively removes or diminishes rights of appeal.

Another indirect influence members attribute to the committee is the extent to which departments and ministers reassess the scope and justification of a policy option before its introduction because of the likelihood of it being subject to a negative or critical committee report. This may occur either because of a growing rights-consciousness within the ministry, or because of personal and informal contacts with members, particularly the chair of the committee. For example, when Victor Perton chaired the Victorian Committee, he viewed his role as going beyond the committee room and sought to persuade relevant ministers and staff to revise a proposed policy, which may have raised rights concerns, before it was actually introduced and subject to the Committee's scrutiny.[29] This option does not arise for the Commonwealth Committee whose chair is from the opposition party.

Considerations for Canada

A Canadian scrutiny of bills committee would face many of the constraints that Australian committees face, particularly those that arise because of the existence of strict and cohesive political parties. A Canadian committee would likely face similar pressure to distinguish between scrutinising rights violations and evaluating the justification for policy.

What makes this conceptual distinction difficult is that the terms of reference for the Commonwealth and Victorian committees do not ask for the mere identification of rights violations. Rather, the issue these committees have to determine is whether a bill trespasses unduly on rights or liberties (Commonwealth) or rights and freedoms (Victoria).

A parallel exists between how Australian committees conceptualise their task and the Supreme Court's two-stage approach to the Charter which distinguishes, analytically, the question of whether a right has been violated from the inquiry into whether the legislation is reasonable. These distinctions can be blurry because an implication of concluding that a policy does "unduly trespass" upon a right, or that it is "not a reasonable limit" on a right, is that the policy imposes too great a burden on a right to be justified. In other words, the policy does not warrant restricting rights, at least to the degree that it has.

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29 Victor Perton, interview with author, 4 July 1996, Melbourne.

The blurry nature of this conceptual distinction is less problematic for a bills committee than it is for a court. Courts are asked, under a system of entrenched rights, to pronounce on whether a policy is or is not constitutional. However, the role of a parliamentary bills committee is different. Rather than viewing these committees as the locus to solve rights issues, and therefore provide an authoritative answer to the question of whether a policy is warranted in light of its implications for rights, it is better to view their role as facilitating and giving structure to parliamentary and public debate about the merits and worthiness of policy.

One way a Canadian scrutiny of bills committee might conceptualise its task would be to structure its inquiry something along the lines of the following:

(1) what is the nature of the rights infringement?

(2) what is the policy objective and what goals does it serve?

(3) does the policy necessarily require limiting a right?

(4) can it be accomplished by less restrictive means?

It is important to emphasise that the purpose of this legislative debate is not to turn parliamentarians into armchair judges by anticipating what may or may not pass judicial scrutiny. Rather, the purpose is to evaluate government's policies from a principled perspective: in terms of the public interest but with regard to the fundamental rights of society. In this sense, the assumption of how a Canadian legislative scrutiny committee would operate is similar to that of the Australian committees which exist without a bill of rights. The hope, in using these committees, is that through a principled and multi-partisan scrutiny of legislation, and the identification of rights concerns, this will place pressure on governments to justify and, where necessary, revise policy decisions to be more sensitive to rights concerns.

3 CASE STUDY: REFUGEE APPLICANTS AND LEGAL RIGHTS

In the remainder of the paper, I will examine the role of the Commonwealth Committee in a controversial and contested issue — the appropriate scope of legal protections offered to refugee applicants who are being detained by the state. The specific issue the Committee had to deal with — should non-citizens be treated differently from citizens in terms of their access to legal rights? — arose in a 1996 proposal to amend the law that governs refugee applicants, including boat people. Existing statutory entitlements recognised a right of detainees to have a lawyer, but the Commonwealth government wanted to minimise the effect of this by forbidding third parties from advising detainees of this right.

The political environment in which the debate took place is one in which the idea of expanding the rights of refugee claimants does not command overwhelming public support. Committee chairperson Barney Cooney has characterised this issue as one of the toughest challenges facing the Committee because both major political parties deny that the state has a moral obligation to inform refugee applicants that they have a right to legal advice and because public opinion is generally supportive of that restrictive approach.[30]

30 Interview with author, Melbourne, 3 July 1996.

Conflict between HREOC and the Department of Immigration and Multicultural Affairs

The question of the scope of the right to legal advice of newly arrived individuals became an important political and legal issue in 1996 when a refugee organisation, Refugee Advice and Casework Service (RACS), was prevented from providing legal advice and assistance to boat people who arrived in Australia in February 1996 from China and who were being detained in isolation and incommunicado by the Department of Immigration and Multicultural Affairs. After its request was refused, the RACS contacted the Human Rights and Equal Opportunity Commission (HREOC). The HREOC, established by the Human Rights and Equal Opportunity Commission Act 1986 (Cth), has, among its other statutory responsibilities, the power to investigate acts which may be inconsistent with human rights.

The HREOC undertook an investigation of the complaint. It wrote to the detainees with an explanation of its inquiry, advised the detainees that the RACS had attempted to advise them about possible legal rights that may be relevant to their situation under the International Covenant on Civil and Political Rights, and invited them to telephone for legal advice. The HREOC also sent an accompanying letter to the Department of Immigration and Multicultural Affairs to explain that, as part of its responsibility to investigate possible rights violations, the Department had a duty to deliver the letter to the detainees. The Department refused to deliver the letter on the basis of the government's position that detainees only have the right to a lawyer if they specifically initiate the request. Upon this refusal to deliver the letter, the HREOC initiated proceedings in the Federal Court to compel the Department to deliver the letters.[31]

In defending its actions the government argued that the HREOC's motivation for writing its letter to detainees was to advise them that they may be able to apply for refugee status which, in its view, was an attempt to circumvent the Department's refugee policy. This allegation was denied by Human Rights Commissioner Chris Sidoti who asserted that the Commission's objective was to inform the detainees of their right to have legal advice in the context of the Commission's investigation. Justice Lindgren ruled in favour of the HREOC and ordered that the letter be delivered. The Court held that the Human Rights and Equal Opportunity Commission Act allows the Commission to correspond confidentially with a detainee whose human rights, a third party alleges, are being infringed. Lindgren J accepted the HREOC's claim that the detainees may be in need of legal advice in connection with the Commission's inquiry and was not troubled by the possibility that, in the process, they might also learn about their status as possible refugees.[32]

Within two weeks of the Court's ruling, the government introduced legislation (Migration Legislation Amendment Bill No 2 1996) intended to overcome the effects of the Court's decision. The bill was introduced into the Senate on June 20, 1996 and sought to amend the Migration Act 1958 (Cth) to remove the statutory ability of the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman to initiate confidential contact with people held in immigration detention.

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31 *Human Rights and Equal Opportunity Commission v Secretary, Department of Immigration and Multicultural Affairs* (1996) 67 FCR 83.

32 Ibid at 99.

When explaining the amendment to the Migration Act, Immigration Minister Philip Ruddock argued it was necessary to clarify the law and make it clear that a person in immigration detention has a right to legal advice only when he or she requests it.[33] According to the Second Reading speech, the Federal Court's decision had the effect of enabling the Human Rights and Equal Opportunity Commission Act to "override the intention of the Migration Act" and thereby change the intention of Parliament.[34] In addition to the purported need to clarify the law, the government defended the bill in cost-benefit terms: if more detainees were aware of their right to a lawyer, this would add considerably to the expenses related to detention and processing of refugee cases.[35]

The legislation was immediately criticised not only by the HREOC[36] but also by the Senate Scrutiny of Bills Committee. The Committee provided a stinging critique of the bill in its Alert Digest which identified a number of rights-based concerns.

Scrutiny Committee's report

The Scrutiny of Bills Committee reported that the government had adopted an unwarranted interpretation of the right of refugee claimants to legal advice in the Migration Act. Although the Act does not specifically authorise third parties to advise claimants of their rights, the government has acted on the "unwarranted conclusion that because the Migration Act 1958 is otherwise silent on the matter of legal access", the government can prevent individuals or groups from advising claimants about their right to legal advice.[37] The committee argued that the protection of rights ought not to be governed by cost-benefit analysis and reaffirmed a comment made on earlier occasions.[38] This was that, for the right to legal advice to be meaningful, governments have an obligation to ensure that people "are able to find out what the law is that affects them".[39] A problem with the legislation is that its provisions are "clearly designed to make it as difficult as possible for the people subject to these laws to find out what rights they have in law".[40]

A different concern of the Committee was with the retrospective operation of the bill. The detainee has a right to have the envelope delivered and, if this is prevented, this right is taken away not by law, but by a "presently unlawful act on the dubious

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33 Commonwealth Parliament Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 1996 at 100.

34 Senator Short, Sen Deb 1996, No 5 at 1934-1935.

35 Philp Ruddock, Minister for Immigration and Multicultural Affairs, Media Release, 19 June 1996.

36 Human Rights Commissioner Chris Sidoti criticised the bill as "unjust, unfair and un-Australian" for its intent of holding people in complete isolation, without access to any information about their rights and without scrutiny even by official bodies established by Parliament. He argued that the Australian parliament should not allow the Department of Immigration "to change the law every time it is found to [be] breaking it". Human Rights and Equal Opportunity Commission, Media release, 20 June 1996.

37 Alert Digest No 4, 26 June 1996 at 15.

38 Commonwealth Parliament Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 1996 at 95.

39 Alert Digest No 4, 26 June 1996 at 16.

40 Ibid.

grounds that perhaps Parliament will pass a proposed law that will have retrospective effect to make the unlawful act lawful".[41] The Committee also argued that the retrospective nature of the bill would place custodial officers working for the Department of Immigration in an invidious position.[42]

The Committee's final rights-based concern was that the bill may contradict Australia's international rights obligations that all persons are entitled to equal protection of the law without discrimination. In its view, the bill may discriminate against unlawful non-citizens by denying to them a lawful means of obtaining access to legal advice.[43]

Senate debate

Debate in the Senate occurred in two stages: whether the government's sense of urgency justified the bill being considered immediately, as opposed to following established order and, once the government won that motion, on the substance of the bill itself. Rights-based concerns figured prominently at both stages of debate.

In justifying the bill, the government argued that it was "urgently required" because refugees and advisers would otherwise take advantage of the Federal Court's decision. Hence, if the bill was not passed, Australia would risk having its entry procedures undermined which "would certainly result in a highly unsatisfactory situation continuing".[44] Labor supported the bill and the motion that it be debated immediately;[45] however, the Democrats and Greens were critical of the bill and rejected the claim that an emergency necessitated immediate debate. Characterising it as an "atrocious bill" the Democrats argued that, quite apart from the procedural issue that this bill did not fall under the Senate's rules for changing the order of debate, supporters of the bill should be ashamed of a law that would deny people knowledge that they had legal rights. Not only was there no urgency, but there was no justification for this action.[46]

One of the most interesting interventions came from the Scrutiny Committee chair Senator Barney Cooney, a Labor member. As was argued earlier, one of the biggest constraints members of a scrutiny committee faces is conflict between the principled concerns of the committee and partisan pressures. This clearly was the case for Senator Cooney. His party supported the motion to debate the bill immediately, and the substance of the bill, and yet he supported a unanimous report that was critical of the bill. The way of resolving this conflict, for Senator Cooney, was to vote the way his party did in the Senate and yet speak out against injustices in the bill:[47]

> [I]t seems an extraordinary piece of legislation that would stop a particular group of people giving information to other people about their legal rights, particularly when

41 Ibid at 13.
42 Commonwealth Parliament Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 1996 at 91-93 and 98-100.
43 Alert Digest No 4, 26 June 1996 at 17.
44 Senator Short, Liberal, Sen Deb 1996, No 6 at 2351.
45 Senator Carr, Labor, ibid at 2352.
46 Senator Spindler, Democrat, ibid at 2352-2353.
47 Senator Barney Cooney, Labor, interview with author, Melbourne, 3 July 1996.

> those people might not know their rights. How can the rule of law operate if nobody knows what the rule of law is?[48]

The government was successful in its motion, on the final day of sitting, to suspend the Senate rules and allow the bill to be dealt with on an urgent basis. However, while the government had numerical support for its bill from Liberal and Labor members, debate about the merits of the bill, which was dominated by rights-based criticisms by Democrats, Greens and by Senator Cooney, consumed the remaining time of the session and the winter session ended before a vote could be held. The Scrutiny Committee's concerns helped structure the ensuing parliamentary debate about the substance and merits of the bill. Critics of the legislation referred frequently to the Alert Digest, acknowledging that it identified "a number of very disturbing aspects of the bill",[49] and urged senators to be given the time and opportunity to consider the Scrutiny Committee's concerns.[50] Opposition Democrats and Greens tried to shame government and Labor members who supported the legislation, by referring to the committee's concerns that the legislation unjustifiably undermined the importance of a right to a lawyer by taking away the ability of third parties to advise refugee detainees of their right.[51] Another criticism was directed at the willingness of proponents of the bill to sacrifice rights for the sake of cost efficiencies.

> If this parliament enacts this bill, we will have taken a very critical step that this nation and this parliament may well regret in the future because we are doing no more and no less than denying our human rights obligations and the rule of law in this country, which should be available to every person on Australian soil within the jurisdiction of our courts. To say that we are prepared to simply cast these considerations aside because it is inconvenient and because we do not want to engage in the very often costly process of allowing these people to challenge in court decisions that are made by government departments, then I believe we are denying a very critical principle on which this nation and the way we are governed depends.
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> I believe we will rue the day if we give up our principles for such considerations, which in any case appear to me to be insubstantial. A few hundred refugees are called a flood and a few hundred refugees cause a crisis, and for that we are prepared to give up our principles?[52]

The Democrats criticised the government for creating a climate that is insensitive to the plight of refugees and inconsiderate of their basic legal rights. The government, in bombarding the community with statements that boat people are necessarily queue jumpers, as opposed to possible genuine refugees, has conveyed to the public the notion that the only migrants who justify consideration are those who visit in a planned and rational manner. Yet this is neither a realistic nor helpful way of understanding the plight of refugees.[53]

An equally effective critique of the legislation came from Senator Cooney who argued that the bill's purpose was to change the law to deliberately make it difficult for refugees to understand what rights they have. He argued that, although the

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48 Senator Cooney, Sen Deb 1996, No 6 at 2353.
49 Senator Spindler, Democrat, ibid at 2561-2563.
50 Senator Bell, Democrat, ibid at 2555-2556.
51 Senator Spindler, ibid at 2561.
52 Ibid at 2563.
53 Ibid at 2566-2567.

government intends to place an onus on unlawful non-citizens to seek legal advice, it is misleading to think that refugees can exercise their legal rights when they may not be aware of them. He was also troubled by the government's suggestion that RACS is engaged "in a direct attack on the fundamental underpinnings of our capacity to manage effectively the boat people issue". This statement, argued Senator Cooney, is "an insult to people from RACS ... . They are not trying to ruin the system. What they are trying to do ... is to see that people know what rights they have when they come to Australia".[54]

Government members in the House of Representatives were critical of the Senate's delay in passing the bill. As the final day of the Senate winter session wound down, the Leader of the House expressed frustration with the government's inability to obtain "assurances, understandings, agreements or otherwise from the opposition parties in the Senate" as to when or whether they will deal with the migration legislation. In his view, certain members of the Senate were engaging in a "fillibuster ... to prevent the transmission of the bill" to the House of Representatives. As it became clear that the Senate would not bring the matter to a resolution before the session ended, the House Leader condemned opposition members for "taking obstructionism to a ridiculous degree"[55] on a policy of high priority.

Committee's influence on the outcome of the government's bill

It is difficult to isolate and identify, in any causal way, the committee's influence on the outcome of the bill. The publicity generated from the Federal Court decision, the Human Rights and Equal Opportunity Commission's criticism of government action, and the controversial nature of the boat people issue ensured that the government's action would generate a lively and robust debate. Yet, notwithstanding the notoriety of the issue, it is appropriate to conclude that the Committee's influence on the parliamentary debate was substantial. This is evident not only from the frequency with which the Committee's concerns were raised in debates related to the bill, but also from the fact that, although public sentiment was not in favour of expanding the rights of refugees, debate focussed on the justification of the government's actions in rights-based terms. This itself is significant because the Committee's concerns that the legislation may infringe upon rights unduly had to compete with an alternative interpretation from the Senate Legal and Constitutional Legislation Committee that the bill should be passed unamended.[56] Although many of the proponents of the legislation attempted to debate the issue in the context of the perceived urgency of the situation — that if not passed with haste "there would be a hiatus in the administration of our immigration policy dealing with unauthorised entries and that betwixt now and

54 Senator Cooney, Sen Deb 1996, No 6 at 2590.

55 Peter Reith, Liberal, H Reps Deb 1996, No 6 at 3186.

56 Commonwealth Parliament Senate Legal and Constitutional Legislation Committee, Migration Legislation Amendment Bill (No 2) 1996 at 22. The recommendation that the bill be passed unamended was not unanimous. Senator Spindler offered a dissenting report in which he argued that the Immigration Minister should accept an offer made by the Human Rights Commissioner and the Ombudsman to handle complaints under their respective Acts, for a period of three months, as if the bill had been passed in its present form to allow the government to revise the bill: ibid at 22-23.

the next sittings there could be all sorts of problems"[57] — the scrutiny Committee's concerns provided grounds for an alternative and rival argument: one based on principles rather than on arguments of administrative expediency. This gave the Democrats, the Greens, and Senator Cooney a moral high-ground in mounting a principled objection to the bill which was difficult to discredit, by government members, as merely an irresponsible filibuster. However, despite the robust parliamentary debate, the bill was only stalled, not defeated. Yet, the second reading debate had not resumed, at the time of writing, and the bill was given a low ranking on the Notice Paper. This suggests that no longer was this issue being portrayed by the government as one of immediate urgency.

CONCLUSIONS

The discretionary element of evaluating the inevitable clash of rights claims, or conflicts between rights and other important values or policies, suggests little reason for assuming the intrinsic superiority of one branch of government over another for undertaking this task. Judges, who are liberated from the pressures of conforming to popular and political pressures, are at a distinct disadvantage when it comes to having to analyse policy and to choose which, among a range of means, represents the most effective, practical and fair measures for pursuing a particular policy objective. Elected representatives, who may be better situated to understand complex policy choices because of their access to extensive resources within and beyond the bureaucracy, encounter significant partisan and electoral pressures.

Parliamentary scrutiny of bills vests greater responsibility in parliament and emphasises democratic debate as the method for determining the justification of legislation in rights-based terms. This is not an approach that can or does purport to guarantee rights. Yet the very idea that rights can be guaranteed is simplistic and misleading. Abstract commitments to rights, now matter how genuine, do not yield consensus on the scope of rights that should be protected, the justification that should be required before restricting rights, or the way of measuring or evaluating whether that justification has been met.

Parliamentary scrutiny may not always be successful in compelling governments to amend laws to adhere to rights-based concerns. Yet the potential and effects of parliamentary scrutiny should not be dismissed. Civil libertarians are not being realistic if they assume that a single approach to identifying rights and enforcing protection can produce liberal outcomes that are consistent with enlightened thinking about the proper way of delineating appropriate state action from the protected sphere of human activity. If there was a universal template of rights that we could fix upon democratic polities, or an institutional arrangement that worked equally well in all models of democratic governance, we would be foolish to divert from this obvious course. But, alas, the idea of protecting rights is deceptively simple.[58]

Although more systematic research is necessary to evaluate the promise and potential of scrutiny of bills committees — for example, the extent to which they are able to facilitate a principled and effective parliamentary debate, and whether this has

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57 Senator Ellison, Sen Deb 1996, No 6 at 2355.
58 See discussion by P H Russell, above n 9 at 43.

a positive effect on policy — the case study examined in this paper provides grounds for cautious optimism. The Commonwealth Standing Committee for the Scrutiny of Bills was able to facilitate a principled, rights-based debate about the justification of a policy for which the government denied any rights implications. This had the effect of delaying a vote on the bill.

The importance of debate is not that it will produce "right answers" but that it will generate a better, and more principled, answer to complex and contested issues than a policy process where rights-based assessments are either absent or marginalised. The purpose of debate is to contribute to, and evaluate legislative obligations in light of fundamental rights and to assess whether policies which limit rights are justified, given the nature of the affected right and the importance of claims for compelling societal values and interests. Debates in which those defending policy choices must justify the effects of these on protected rights will better expose the discriminating effects of policies or possible unintended consequences that impair or undermine protected rights. Processes that result in governments having to justify their action, where rights concerns are raised, should be welcomed in a democratic polity and, in particular, in executive-dominated Westminster parliamentary models.

The existence of systematic legislative scrutiny, as occurs in Australia, should be considered even in systems, such as Canada, with judicially interpreted bills of rights. Judges are often poorly situated to assess the justification and reasonableness of complex policy choices, and would benefit from parliamentary rights scrutiny. Where legislative records reveal that a policy has been subject to meaningful and deliberative debate about the worthiness of its objective, unless the court believes strongly that the legislation restricts the core of a fundamental right, or imposes a limit that is obviously excessive or unreasonable, little justification exists for judges to nullify these decisions. Conversely, where legislative decisions have not been the product of careful deliberation about why the policy is justified in light of its effects on rights, or of consideration of alternative and less restrictive means, judicial deference may be inappropriate. By refusing to accept the justification of impugned policies where rights concerns have not been fully considered, courts will provide an important incentive for representative institutions to pay more attention to the effects of policy choices on fundamental rights.